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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY

 DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LARRY DARNELL ARTHUR,

Plaintiff,

vs.

R. TORRES, Correctional Sergeant;  
F. GONZALES, Correctional Officer;  
J. FLORES, Correctional Officer,

Defendants.

CASE NO. 06cv2455-BEN (CAB)

**ORDER GRANTING MOTION  
FOR EXTENSION OF TIME TO  
APPEAL**

**[Doc. No. 37]**

On June 3, 2008, this Court adopted a Report and Recommendation of the Magistrate Judge, granted Defendants' Motion to Dismiss, and dismissed this case upon finding that Plaintiff had failed to exhaust his administrative remedies. On July 22, 2008, Plaintiff filed an untimely appeal of the Court's June 3, 2008, decision with the Ninth Circuit Court of Appeals. *See* Doc. Nos. 38; Fed. R. App. P. Rule 4(a)(1)(A) ("In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."). On the same day, Plaintiff also filed a Motion for Leave to File a Notice of Appeal. *See* Doc. Nos. 37.

On September 12, 2008, the Ninth Circuit Court of Appeals filed an Order in the instant case, construing Plaintiff's motion as a request "for an extension of time to appeal" and asking this Court to rule on Plaintiff's motion. *See* Doc. No. 44. Rule 4(a) of the Federal Rules of Appellate Procedure provides:

(A) The district court may extend the time to file a notice of appeal if:  
 (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and  
 (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

*See* Fed. R. App. P. Rule 4(a)(5).

The U.S. Supreme Court made it “clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.” *Bowles v. Russell*, 127 S.Ct. 2360, 2366 (2007). A district court, however, has “limited authority to grant an extension of the 30-day time period” upon showing of excusable neglect or good cause. *See id.* Accordingly, the court may “be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” *Pioneer Inv. Serv’s Co. v. Brunswick Assoc’s*, 507 U.S. 380, 388 (1993). This is an “equitable” determination, and the court must consider “all relevant circumstances surrounding the party’s omission.” *Id.* at 395.

In this case, Plaintiff claims that the delay in filing his notice of appeal resulted from a prison transfer and his inability to access his legal documents at the time of transfer. *See* Doc. No. 37, at 1-2. He alleges that he did not receive a notice of the Court’s June 3, 2008, order until June 14, 2008. He further states that he was denied access to his legal documents for a period between June 14, 2008 and July 15, 2008 – several weeks before and after his prison transfer. *Id.*

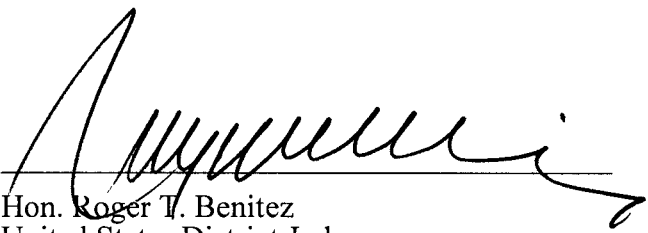
Notably, Plaintiff provided no evidence supporting his claim, except for a change of address form, which he filed simultaneously with the instant Motion. *See* Doc. No. 36. He did not provide the Court with any mail logs, transfer documents, affidavits, prison grievances, or any other evidence indicating that prison officials made Plaintiff’s legal records inaccessible for a period of time between June 14, 2008 and July 15, 2008. Nevertheless, in the interest of justice, and because Defendants have not objected to Plaintiff’s request for an extension of time, the Court grants the request. *See, e.g., Stephanski v. Superintendent of Upstate Corr.*, Civ. No. 02-0562, 2007 WL 210399, at \*1-2 (W.D.N.Y. Jan. 25, 2007) (citing *Williams v. Adams*, Civ. No. 04-5203, 2006 WL 1071962, at \*1 (E.D. Cal. Apr. 24, 2006) (concluding that prison transfers constituted excusable neglect and granting an extension)). The Court, therefore, GRANTS Plaintiff’s request

1 for an extension of time to file an appeal.

2 Pursuant to Rule 4(a)(5), upon granting an extension, the Court must give Plaintiff a thirty-  
3 day extension from his original deadline or ten days from the date of an order granting an  
4 extension, whichever is later. *See* Fed. R. App. P. Rule 4(a)(5)(C). The docket reflects, however,  
5 that Plaintiff filed a notice of appeal simultaneously with his request for an extension. *See* Doc.  
6 No. 38. Thus he should not be required to re-file his notice of appeal. *See Stephanski*, 2007 WL  
7 210399, at \*2. Accordingly, the Clerk of Court is directed to re-docket Plaintiff's Notice of  
8 Appeal on the date of the entry of this order.

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10 IT IS SO ORDERED.

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12 DATED: 

  
14 Hon. Roger T. Benitez  
15 United States District Judge  
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